UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

FLOONICS, LLC
Employer
and Case 5-RC-15910

STEAMFITTERS LOCAL UNION NO. 602,
UNITED ASSOCIATION OF JOURNEYMEN
AND APPRENTICES OF THE PLUMBING
AND PIPE FITTING INDUSTRY OF THE
UNITED STATES AND CANADA, AFL-CIO
Petitioner

SUPPLEMENTAL DECISION ON OBJECTIONS AND CHALLENGES

Pursuant to a Decision and Direction of Election[1] issued by me on November 9, 2005[2], a secret-ballot election was conducted under my supervision on December 16 with the following results:

Approximate number of eligible voters	28
Void ballots	2
Votes cast for Petitioner	12
Votes cast against participating labor organization	6
Valid votes counted	18
Votes challenged	3
Valid votes counted plus challenged ballots	21

On March 20, 2006, the Employer filed timely objections to conduct affecting the results of the election.

[1] The unit is: "All field employees employed by the Employer excluding foreman, detailers, project managers, project engineers, office clericals, and guards and supervisors as defined by the Act." By order dated November 22, 2005, the Board denied the Employer's Request for Review of my Decision and Direction of Election.
[2] All dates herein refer to 2005, unless otherwise noted.

THE OBJECTIONS

OBJECTION ONE

> The Regional Director for Region Five of the National Labor Relations Board ("Region") engaged in objectionable conduct that favored Union proponents by mailing duplicate ballots to twelve former employees who reside in Puerto Rico who had no reasonable expectation of recall.

In support of this Objection the Employer cites Sierra Lingerie[3], in which the Board found an employee ineligible to vote because she had been laid off during the period between the eligibility date and the election date, with no expectancy of recall. The Employer also submits a November 21 letter from MedImmune terminating the contract between the Employer and MedImmune. The letter declares that the contract would terminate within seven days. On November 28, the Employer sent letters to employees advising them of the contract termination and informing them that they should not expect to be recalled or rehired by the Employer at any location in the future; a copy of this letter was submitted by the Employer in support of the Objection. The Employer also provided several pages of employee testimony from the pre-election hearing in this case. The Employer did not present any evidence to support the assertion that these individuals were mailed duplicate ballots.

The first issue raised by the Employer's Objection One, that these employees did not have a reasonable expectancy of recall, is inextricably linked to an issue in Case 5-CA-33014, which the Region found to be meritorious. The investigation in that case revealed that on or about November 28, the Employer refused to consider for recall, or rehire, 13 employees because the employees assisted the Petitioner and engaged in concerted activities, in violation of

[3] 191 NLRB 844 (1971).

Section 8(a)(3) of the Act. The Region issued a Complaint in that case on July 27, 2006.

While the Employer did not present any evidence to support its assertion that twelve former employees were sent duplicate ballots, I will address the objection. The Region's file indicates that the Employer-provided *Excelsior* list contained only the Puerto Rico addresses for twelve individuals. The Petitioner advised the Region that it was concerned these individuals, some of whom still lived in the United States, might not receive the ballot kits in time. Therefore, the Petitioner provided the Region with local addresses for the individuals. In the interest of affording all eligible employees an opportunity to vote, the Region sent a duplicate ballot kit to each local address.

It appears substantial and material issues of fact exist with respect to the allegations contained in Objection 1, which can best be resolved by record testimony. I therefore direct that a hearing be held on Objection 1.

OBJECTION TWO

> The Region engaged in objectionable conduct by unilaterally changing the election from an on-site election to mail ballot election after receiving criticism from the Employer's counsel about setting up mobile election sites to favor union proponents voting on behalf of the union. The parties entered into a Stipulated Election Agreement prior to the election which did not provide for a mail ballot election.

In support of Objection Two, the Employer cites two cases, Willamette Industries[4] and T & L Leasing.[5] The Employer submitted a December 6 letter written by Employer's counsel. The letter objects to a mobile site in Gaithersburg, Maryland and suggests that a similar site should be arranged in Pittsburgh, Pennsylvania to accommodate two employees that reside there. The Employer also provided a copy of a

[4] 322 NLRB 856 (1997).
[5] 318 NLRB 324 (1995).

December 1 e-mail to the Region in which Employer's counsel objects to additional polling sites and informs the Board Agent that because of the additional sites and date change, the Employer will not have a representative present at the ballot count.

Both cases cited by the Employer are factually distinguishable from the instant matter. In Willamette, the Board reversed the Acting Regional Director's decision to conduct a mail-ballot election, where the sole consideration was that the Employer's facility was located

80 miles away from the Region's office. In T & L, the Board directed a rerun election because the Regional Director unilaterally ordered a mail-ballot election, after the parties had entered into a Stipulated Election Agreement. In the instant matter, the parties did not enter into a Stipulated Election Agreement. Rather, a hearing was conducted and I issued a Decision and Direction of Election on November 9. In situations such as these, arrangements as to type of election are to be resolved administratively, and the parties so notified by letter.[6] Further, a Region Director is afforded broad discretion to determine which type of election, manual or mail ballot, would most enhance the opportunity for all eligible voters to vote.[7]

In the instant matter, the Region attempted to accommodate employees at various job sites by establishing three separate polling sites. However, the Employer expressed a concern that two voters in Pittsburgh, Pennsylvania, would not be able to vote at any of those three sites. The Employer further objected to the manual arrangements because a representative would not be available for the ballot count. Accordingly, in an effort to provide all voters an opportunity to vote, the Region

[6] Case Handling Manual, Part Two, Representation Proceedings, Section 11301.4
[7] Case Handling Manual, Part Two, Representation Proceedings, Section 11301.2.; San Diego Gas & Electric, 325 NLRB 1143 (1998).

determined that a mail ballot election would be appropriate and consulted with the parties before sending a confirmation letter on December 6, 2006.

It appears substantial and material issues of fact exist with respect to the allegations raised by this objection, which can best be resolved by record testimony. I therefore direct a hearing be held with respect to the issues raised by Objection 2.

OBJECTION THREE

> The Region engaged in objectionable conduct by refusing to issue ballots to voters on the Excelsior list even after the Region was notified that these voters had not received ballots.

In support of Objection Three, the Employer cites several cases[8] in which the Board set aside a mail ballot election on the basis that some eligible voters were not afforded an opportunity to vote as a result of each respective Region's actions. The Employer provided a memo detailing a voicemail message Employer's counsel purportedly left for a Board agent, advising the Board agent that certain employees had not received ballots. The Employer also submitted declarations of the three employees who assert they did not receive their ballots. The three employees state that they notified their Employer of the oversight, and their Employer then notified counsel, who notified the Region via the above-referenced voicemail. One employee declares that he spoke with the election specialist at the Region who assured the employee that he would overnight the ballot kit. The employee states he never received the ballot kit.

The cases cited by the Employer all involve situations where voters were disenfranchised because the Region involved failed to take appropriate action to ensure that all voters had an opportunity to vote. For example, in North America Aviation, Inc.,

[8] Oneida County Community Action Agency, Inc., 317 NLRB 852 (1995); Davis & Newcomer Elevator Co., 315 NLRB 715 (1994); International Total Services (ITS), 272 NLRB 201 (1984); Star Baking Co., 119 NLRB 835 (1957); and North American Aviation, Inc., 81 NLRB 1046 (1949).

and Star Baking Co., the Regions did not allot enough time for the ballots to be returned. In Davis, the Region failed to send a duplicate ballot kit to an individual after receiving the person's ballot separate from the ballot envelope. Similarly, in Oneida, the Region failed to send duplicate ballot kits to individuals who did not receive the original ballot kit. Finally, in ITS, the Region failed to send out duplicate ballot kits to seven individuals whose ballot kits were returned to the Region by the post office.

The three employees' names do appear on the *Excelsior* list; though the file is not clear when, the file does reflect they were sent duplicate ballot kits. In the instant matter, the evidence offered by the Employer does not establish that the Region failed or refused to send duplicate kits to the three employees.

It appears substantial and material issues of fact exist with respect to the allegations, which can best be resolved by record testimony. Accordingly, I direct a hearing be held with respect to the issues raised by Objection 3.

OBJECTION FOUR

> The Region engaged in objectionable conduct by issuing a Complaint contrary to the facts in a prejudicial effort to allow employees with no expectation of a right to recall to vote in the election.

In support of Objection Four, the Employer relies on the same documents submitted in support of Objection One. Specifically, the Employer relies on a letter from the Employer's client, MedImmune, which terminated the parties' work contract; a letter to employees advising them of the contract termination and that they should not expect to be recalled or rehired; and several pages of transcripts from the pre-election hearing.

As explained above in response to Objection One, the Region's investigation of

Case 5-CA-33014 revealed that the Employer refused to recall, or rehire, employees because of their concerted activities on behalf of the Petitioner, in violation of Section 8(a)(3) of the Act. The Region issued Complaint in that matter on July 27, 2006. Accordingly, the Employer's contention that the Region issued Complaint in an effort to allow individuals with no expectancy of recall to vote is contrary to the facts disclosed by the Region's investigation, as well as contrary to my findings in the Decision and Direction of Election, concerning which the Board denied review.

It appears substantial and material issues of fact exist with respect to the allegations raised by this objection, which can best be resolved by record testimony. Therefore, I direct that a hearing be held with respect to the issues raised by Objection 4.

OBJECTION FIVE

> The Region engaged in objectionable conduct by delaying the counting of the ballots in a prejudicial effort to favor the Puerto Rican voters who had no expectation of continued employment and who were sent double ballots.

In support of this objection, the Employer cited Monte Vista Disposal Co.[9], and referred to the evidence submitted in support of Objections One and Four, which speaks to employee status and eligibility of the individuals. The Employer did not present evidence that these employees' ballots were returned after the deadline of 1 p.m. on January 17, 2006; or that they were in fact sent double ballots.

The mail ballot kits were distributed on December 16 and were due to be returned to the Regional Office by 1 p.m. on January 17, 2006. While it is customary that the return time for mail ballots be two weeks, additional time may be granted around

[9] 307 NLRB 531 (1992).

holiday periods.[10] Late December is a holiday period which warranted an extension of time for the return of ballots, as did the fact the Excelsior list supplied by the Employer included addresses 1 in Puerto Rico.

The case cited by the Employer, Monte Vista, dictates that an employee who arrives late to the polls in a manual election should cast a challenged ballot which may only be counted if all parties agree. Though the Employer did not provide evidence that a ballot kit was returned after the January 17, 2006 deadline, in such an event, the individual's ballot would be counted, provided it was returned prior to the ballot count.[11]

The third allegation contained in this Objection, that the employees received double ballots, is addressed above in response to Objection 1.

It appears substantial and material issues of fact exist with respect to the allegations raised by this objection, which can best be resolved by record testimony. Accordingly, I direct a hearing be held with respect to the issues raised by Objection 5.

THE CHALLENGES

At the ballot count, the Union challenged the ballots of Robert Freed and Andy Lebron on the basis that they are supervisors and do not perform unit work. The Union also challenged the ballot of Mark Lunardi on the basis that his employment with the Employer was terminated before the actual date of the election. At the ballot count, the Tally of Ballots declared that the three challenges were not sufficient to affect the results of the election.

[10]Case Handling Manual, Part Two, Representation Proceedings, Section 11336.2(d).
[11] Case Handling Manual, Part Two Representation Proceedings, Section 11336.5(c); Kerrville Bus Co., 257 NLRB 176 (1981); Watkins Construction Co., 332 NLRB 828 (2000).

Employer's Objection Three asserts that three individuals did not receive ballots, and thus were unable to vote. In light of Employer's Objection Three and the six vote margin revealed by the tally of ballots, it may be necessary or prudent to resolve one or more of the challenged ballots.

Therefore, I direct that a hearing be held with respect to the eligibility of Robert Freed, Andy Lebron, and Mark Lunardi.

SUMMARY

I direct that a hearing be held on all Objections. Further, in view of the similarity of Employer's Objections 1 and 4 with the unfair labor practices alleged in Case 5-CA-33014, and since Complaint has issued in that case, the undersigned orders the consolidation of Case 5-RC-15910 with Case 5-CA-33014, for the purpose of hearing, ruling, and decision by an Administrative Law Judge.

ORDER

IT IS HERBY ORDERED, pursuant to Sections 102.33 and 102.69 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, that Case 5-RC-15910 be, and hereby is, consolidated with Case 5-CA-33014 for the purpose of a hearing, ruling and decision by an Administrative Law Judge on all Objections. Thereafter, Case 5-RC-15910 shall be transferred and continued before the Board in Washington, D.C. and the provisions of Section 102.46 and 102.49 of the above-mentioned Rules shall govern the filing of exceptions.

NOTICE OF HEARING

PLEASE TAKE NOTICE that commencing at 10:00 a.m. on Monday, November 13, 2006, and on consecutive days thereafter, a hearing will be conducted in Richmond, Virginia, before a duly designated Administrative Law Judge of the National Labor Relations Board on issues raised by Employer's Objections 1 through 5 and on the allegations set forth in Complaint issued in Case 5-CA-33014, at which time the parties will have the right to appear in person, or otherwise, and give testimony.

Dated at Baltimore, Maryland this 15th day of August 2006.

(SEAL) WAYNE R. GOLD

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Wayne R. Gold, Regional Director
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